Hongkong Bank (M) Bhd v Tan Tock Sing & Ors

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-58 OF 1995
AUGUSTINE PAUL JC
16 MARCH 1998

Civil Procedure *— Affidavits — Affidavit in support of application — Filing and service of — Whether computation of 14-day period in O 32 r 13(2) of the Rules of the High Court 1980 for service of affidavit is to commence from the date of filing or sealing of the summons — Whether defendant's affidavit in support of the application was served out of time*

Civil Procedure *— Summons for directions — Delay in taking out summons — Whether applicant for summary judgment whose application has been dismissed must apply for summons for directions — Whether time period begins to run from date of dismissal of application — Plaintiff had taken out summons for directions after expiry of one month period without seeking an extension of time — Whether court ought to exercise its inherent jurisdiction to extend time — Whether summons for directions taken out by plaintiff was out of time — Rules of the High Court 1980 O 25 r 1(2)(a)*

Civil Procedure *— Summons for directions — Delay in taking out summons — Plaintiff failed to take out summons for directions within stipulated period — Whether defendant must prove inordinate delay on the part of plaintiff and prejudice suffered by defendant before summons could be dismissed — Rules of the High Court 1980 O 25*

On 6 April 1996, the plaintiff filed an application for summary judgment against the second defendant which was dismissed. No further steps were taken by the plaintiff till 29 January 1997 when its solicitors wrote to the solicitors for the second defendant to inquire whether the matter could be settled. There was no response from the solicitors for the second defendant to this letter. The plaintiff subsequently filed a summons for directions on 10 May 1997 which was fixed for hearing on 3 June 1997. In the meantime, the solicitors for the second defendant filed an application on 2 June 1997 praying for an order, inter alia, that the summons for directions be struck out on the ground that it had been filed out of time and that the action be dismissed for want of prosecution. On the same day, an unsealed copy of the application was served on the solicitors for the plaintiff. By letter dated 3 June 1997, the solicitors for the second defendant served on the solicitors for the plaintiff a copy of their affidavit in support of the application made by them. On 17 June 1997, the solicitors for the plaintiff received a sealed copy of the application and the affidavit in support of it from the solicitors for the second defendant. The learned senior assistant registrar heard the second defendant's application and dismissed it on 22 November 1996. The second defendant appealed.

Counsel for the plaintiff contended that O 25 r 1(2)(a) of the Rules of the High Court 1980 ('the RHC') dispenses with the requirement of a summons for directions when a party makes an application for summary judgment. Therefore, he said, O 25 r 1 ceases to be applicable with the result that the one-month period

specified therein was not relevant. Alternatively, counsel prayed for the court to invoke its inherent jurisdiction to extend the time to enable him to take out his summons for directions. Counsel for the plaintiff also submitted that there had been no inordinate delay on his part in proceeding with the action to warrant it being dismissed and, in support of his argument, relied on the principles laid down in *Birkett v James* [1977] 2 All ER 801. Counsel for the second defendant replied that the plaintiff was guilty of intentional and contumelious conduct and that the action should be dismissed for want of prosecution without proof of prejudice from her client. She argued that the principles laid down in *Birkett v James* [1977] 2 All ER 801 should be reviewed.

At the hearing of the appeal, learned counsel for the plaintiff raised a preliminary objection to the effect that the second defendant's application and affidavit in support of the application were served on him out of time based on O 32 of the RHC.

Held, allowing the appeal and ordering the second defendant's application be dealt with as if it were a summons for directions:

(1) A summons ought to be regarded as having been dated and sealed on the day on which it is filed. In the circumstances, it makes no difference whether the computation of the 14-day period in O 32 r 13(2) of the RHC for the service of an affidavit is to commence from the date of filing or sealing of the summons. With regard to service of the summons, the language employed in O 32 r 3 of the RHC requires a sealed copy to be served. As it is sufficient to serve the summons two clear days before the hearing date, it follows that service of the summons and the affidavit may not coincide. The practice of litigants serving an unsealed copy of the summons together with the affidavit — though the unsealed copy may fail to qualify as a legal document — does serve as an endorsement to the effect that the application will be supported by an affidavit. That meets the requirement of O 32 r 13(1) of the RHC which requires notice to be given to the other party of the intention to use an affidavit. Therefore, in the present case, the documents were served on the plaintiff within time as required by the RHC. In any event, service of the affidavit by the second defendant on the plaintiff on 3 June 1997 when the application was filed and sealed on 2 June 1997 amounts to it being served within 14 days of filing and sealing of the application. As provided by O 32 r 3 of the RHC, the summons was served well before two clear days prior to the hearing date. Accordingly, the preliminary objection raised by the plaintiff could not be sustained (see pp 100F–I and 101A–B).

(2) Order 25 r 1(2)(a) of the RHC clearly states that the requirement of a summons for directions does not arise when, inter alia, a party has applied for summary judgment and directions have been given. However, where the application is dismissed, the court has no power to give directions for the obvious reason that when the application is dismissed, parties are restored to their

original position. It follows that in such instances, O 25 r 1(2)(a) of the RHC has no application. In such circumstances, the applicant for summary judgment whose application has been dismissed must apply for a summons for directions. The time period will, as of necessity, run from the date of dismissal of his application, that is to say, in this case, one month from 22 November 1996. However, the plaintiff had taken out his summons for directions after the expiry of the one-month period without seeking an extension of time to enable him to do so. On the facts, it was clear that this was not a proper case for the court to exercise its inherent jurisdiction to extend time. Therefore, the summons for directions taken out by the plaintiff was out of time and as there was no application requesting for an extension of time to do so, it must be dismissed (see pp 103D–F, H, 105A, C and 106B).

(3) Order 25 of the RHC is sufficient to ensure that proceedings are conducted expeditiously and at the same time it contains enough safeguards to see that cases are not struck out unreasonably. If a plaintiff fails to take out a summons for directions within the stipulated period, the defendant may, inter alia, apply for the action to be dismissed. This right accrues to the defendant upon the plaintiff failing to take out the summons within the prescribed time. In the light of such explicit provisions, it is a contradiction in terms to say that there must be inordinate delay on the part of the plaintiff in prosecuting his case and prejudice suffered by the defendant before it could be dismissed for non-compliance with the rules. The principles create a fetter in the due administration of justice and slow down the litigation process rather than expediting it (see p 110F–H); *Birkett v James* [1977] 2 All ER 801 not followed; *Westminster City Council v Clifford Culpin & Partners* (1987) 137 New LJ 736; *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897 and *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417 followed.

Moreover, the court had the power to deal with the second defendant's application as if it were a summons for directions. This power entrusted to the court ensures that cases are not dismissed automatically upon failure of a plaintiff to issue a summons for directions within the one-month period. It is a discretionary power to be exercised dependent on the facts of a particular case. In exercising this power, the court took into account the fact that the delay in this case is not substantial and that the defendant himself had contributed to it to some extent. Accordingly, it was ordered that the second defendant's application be dealt with as if it were a summons for directions and the case be remitted to the senior assistant registrar to make the necessary orders within two weeks from judgment (see p 111F–H).

[Bahasa Malaysia summary

Pada 6 April 1996, plaintif telah memfailkan satu permohonan untuk penghakiman terus terhadap defendan kedua yang mana telah ditolak.

Tiada langkah seterusnya telah diambil oleh plaintif sehingga 29 Januari 1997 bila mana peguamcaranya telah menulis kepada peguamcara defendan kedua untuk menanyakan sama ada perkara tersebut boleh diselesaikan. Tidak terdapat apa-apa jawapan daripada peguamcara defendan kedua kepada surat ini. Plaintif kemudiannya telah memfailkan satu saman untuk arahan pada 10 Mei 1997 yang mana telah ditetapkan untuk pembicaraan pada 3 Jun 1997. Sementara itu, peguamcara defendan kedua telah memfailkan satu permohonan pada 2 Jun 1997 memohon untuk mendapatkan satu perintah, antara lain, agar saman untuk arahan itu dibatalkan atas alasan bahawa ia telah difailkan di luar masa dan bahawa tindakan tersebut ditolak kerana ketiadaan pendakwaan. Pada hari yang sama, sesalinan permohonan tersebut yang tidak dimeterai telah disampaikan ke atas peguamcara plaintif. Melalui surat bertarikh 3 Jun 1997, peguamcara defendan kedua telah menyampaikan ke atas peguamcara plaintif sesalinan dari afidavit mereka bagi menyokong permohonan yang dibuat oleh mereka. Pada 17 Jun 1997, peguamcara plaintif telah menerima salinan permohonan tersebut yang telah dimeterai dan afidavit yang menyokongnya daripada peguamcara defendan kedua. Penolong kanan pendaftar yang bijaksana telah mendengar permohonan defendan kedua dan menolaknya pada 22 November 1996. Defendan kedua telah merayu.

Peguam plaintif menghujahkan bahawa A 25 k 1(2)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak memerlukan saman untuk arahan apabila sesuatu pihak membuat permohonan untuk penghakiman terus. Oleh itu, beliau berkata, A 25 k 1 tidak lagi terpakai dengan keputusan bahawa tempoh masa selama sebulan yang ditetapkan di dalamnya adalah tidak relevan. Secara alternatif, peguam telah memohon supaya mahkamah menggunakan bidang kuasa sedia adanya untuk melanjutkan masa bagi membolehkan beliau mengambil saman untuk arahan. Peguam plaintif juga berhujah bahawa tidak terdapat kelewatan yang melampau di pihaknya dalam meneruskan tindakan tersebut bagi mewajarkan penolakannya dan bagi menyokong hujahannya, beliau telah bergantung pada prinsip-prinsip yang dibentangkan oleh *Birkett v James* [1977] 2 All ER 801. Peguam defendan kedua menjawab bahawa plaintif bersalah atas perlakuan yang hina dan disengajakan dan bahawa tindakan itu seharusnya ditolak kerana ketiadaan pendakwaan tanpa bukti kemudaratan daripada kliennya. Beliau berhujah bahawa prinsip-prinsip yang dibentangkan dalam *Birkett v James* [1997] 2 All ER 801 seharuslah dikaji semula.

Di perbicaraan rayuan, peguam plaintif yang bijaksana telah membangkitkan bantahan awal bahawa permohonan defendan kedua dan afidavit sokongan permohonan tersebut telah disampaikan ke atas beliau di luar masa yang dihadkan berdasarkan A 32 KMT.

Diputuskan, membenarkan rayuan dan memerintahkan permohonan defendan kedua diuruskan seolah-olah ia adalah merupakan saman untuk arahan:

(1) Sesuatu saman seharusnya dianggap sebagai telah diberikan tarikh dan dimeterai pada hari ia difailkan. Dalam keadaan itu, tiada bezanya sama ada pengiraan tempoh 14-hari dalam A 32 k 13(2) KMT bagi penyampaian sesuatu afidavit seharusnya bermula dari tarikh pemfailan atau pemeterian saman tersebut. Berhubung penyampaian saman, bahasa yang digunakan dalam A 32 k 3 KMT menghendaki supaya sesalinan yang bermeterai disampaikan. Oleh kerana ia adalah memadai untuk menyampaikan saman tersebut dua hari sebelum tarikh pembicaraan, ini bermakna bahawa penyampaian saman dan afidavit mungkin tidak selaras. Amalan litigan-litigan menyampaikan sesalinan saman yang tidak dimeteraikan bersama-sama dengan afidavit — walaupun salinan yang tidak dimeteraikan itu berkemungkinan gagal untuk layak diterima sebagai suatu dokumen yang sah — sesungguhnya bertindak sebagai suatu pengendorsan yang memberi kesan bahawa permohonan itu akan disokong oleh satu afidavit. Hal ini memenuhi kehendak-kehendak A 32 k 13(1) KMT yang menghendaki supaya notis diberikan kepada pihak yang lain itu mengenai niat untuk menggunakan suatu afidavit. Oleh itu, dalam kes semasa ini, dokumen-dokumen tersebut telah disampaikan ke atas plaintif dalam tempoh sepertimana yang dikehendaki oleh KMT. Dalam sebarang keadaan, penyampaian afidavit oleh defendan kedua ke atas plaintif pada 3 Jun 1997 ketika permohonan tersebut difailkan dan dimeteraikan pada 2 Jun 1997 menyebabkan ia disampaikan dalam tempoh 14 hari dari pemfailan dan permohonan tersebut dimeteraikan. Sepertimana yang diperuntukkan oleh A 32 k 3 KMT, saman tersebut telah disampaikan dua hari genap sebelum tarikh pembicaraan. Sehubungan itu, bantahan awal yang dibangkitkan oleh plaintif tidak dapat dipertahankan (lihat ms 100F–I dan 101A–B).

(2) Aturan 25 k 1(2)(a) KMT tersebut dengan jelasnya menyatakan bahawa kehendak sesuatu saman untuk arahan tidak berbangkit apabila, antara lain, sesuatu pihak telah memohon untuk penghakiman terus dan arahan-arahan telah diberi. Walau bagaimanapun, di mana permohonan tersebut telah ditolak, mahkamah tidak mempunyai kuasa untuk memberi arahan atas alasan yang nyata bahawa apabila permohonan ditolak, pihak-pihak dikembalikan kepada kedudukan asal mereka. Ini bermakna bahawa dalam keadaan-keadaan yang sedemikian A 25 k 1(2)(a) KMT tidak terpakai. Dalam keadaan-keadaan yang sedemikian, pemohon untuk penghakiman terus yang mana permohonanya telah ditolak semestinya memohon untuk mendapatkan satu saman untuk arahan. Tempoh masa itu akan, mengikut keperluannya, bermula daripada tarikh penolakan permohonannya, iaitu, dalam kes ini, satu bulan daripada 22 November 1996. Walau bagaimanapun, plaintif telah mengambil saman untuk arahannya selepas luputnya tempoh sebulan tanpa mendapatkan perlanjutan masa bagi membolehkan

beliau berbuat sedemikian. Berdasarkan fakta-fakta, adalah jelas bahawa ini bukannya merupakan kes yang wajar bagi mahkamah melaksanakan bidang kuasa sedia ada untuk melanjutkan masa. Dengan itu, saman untuk arahan yang dikeluarkan oleh plaintif adalah di luar masa dan oleh kerana tiada permohonan yang meminta lanjutan masa untuk melakukan sedemikian, ia haruslah ditolak (lihat ms 103D–F, H, 105A, C dan 106B).

(3) Aturan 25 KMT memadai bagi memastikan bahawa prosiding dikendalikan dengan segera dan pada masa yang sama ia melindungi secukupnya agar kes-kes tidak dibatalkan secara tidak munasabah. Jika seseorang plaintif gagal untuk mengeluarkan saman untuk arahan dalam tempoh yang ditetapkan, defendan boleh, antara lain, memohon supaya tindakan tersebut ditolak. Hak ini terakru kepada defendan setelah plaintif gagal untuk mengeluarkan saman tersebut dalam tempoh yang ditetapkan. Memandangkan peruntukan jelas yang sedemikian, adalah merupakan suatu percanggahan untuk menyatakan bahawa pasti terdapatnya kelewatan yang melampau di pihak plaintif dalam mendakwa kesnya dan kemudaratan dialami oleh defendan sebelum ia boleh ditolak kerana ketidakpatuhan kaedah-kaedah. Prinsip-prinsip tersebut mewujudkan suatu halangan dalam mentadbirkan keadilan dan melambatkan proses litigasi, bukan mempercepatkannya (lihat ms 110F–H); *Birkett v James* [1977] 2 All ER 801 tidak diikut; *Westminster City Council v Clifford Culpin & Partners* [1987] 137 New LJ 736; *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897 dan *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417 diikut.

Lagipun, mahkamah mempunyai kuasa untuk berurusan dengan permohonan defendan kedua seolah-olah ia adalah merupakan saman untuk arahan. Kuasa yang diamanahkan kepada mahkamah ini memastikan bahawa kes-kes tidak ditolak secara automatik setelah plaintif gagal untuk mengeluarkan satu saman untuk arahan dalam tempoh sebulan itu. Ia merupakan kuasa budi bicara yang harus dilaksanakan bergantung pada fakta-fakta sesuatu kes tertentu. Dalam melaksanakan kuasa ini, mahkamah telah mengambil kira fakta bahawa kelewatan dalam kes ini tidak substansial dan defendan sendiri telah menyumbang kepadanya di suatu tahap. Sehubungan itu, ia diperintahkan supaya permohonan defendan kedua diuruskan seolah-olah ia adalah suatu saman untuk arahan dan kes diremitkan kepada penolong kanan pendaftar untuk membuat perintah-perintah yang perlu dalam tempoh dua minggu daripada penghakiman (lihat ms 111F–H).]

Notes

For cases on the service of affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 287–288.

For cases on delay in taking out a summons for direction, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4796–4797.

Cases referred to

Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543 (refd)
Aly v Aly (1984) 128 Sol J 65 (refd)
Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors [1997] 5 MLJ 685 (refd)
Birkett v James [1977] 2 All ER 801 (not folld)
Cookson v Knowles [1978] 2 All ER 604 (refd)
Costellow v Somerset County Council [1993] 1 WLR 256 (refd)
Datuk M Kayveas v PV Das [1997] 4 CLJ 544 (refd)
Dept of Transport v Chris Smaller (Transport) Ltd [1989] 1 All ER 897 (folld)
Evans v Bartlam [1937] AC 473 (refd)
Grovit & Ors v Doctor & Ors [1997] 2 All ER 417 (folld)
Ho Yoke Kwei & Anor v Ong Eng Hin [1997] 4 MLJ 292 (refd)
Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor [1981] 1 MLJ 254 (refd)
Kok Song Kong v BSP Co Sdn Bhd [1988] 2 MLJ 440 (refd)
Leong Seng Kiat v Law Peng Guan & Ors [1992] 2 CLJ 825 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Price v Dannimac The Independent, 3 August 1990 (refd)
R v Nicholas (1986) The Times, 23 April (refd)
Ratnam v Cumarasamy & Anor [1965]MLJ 228 (refd)
Rechik Kadir & Anor v Mohamed Shah Senusi [1997] 1 CLJ Supp 508 (refd)
Savill v Southend Health Authority [1995] 1 WLR 1254 (refd)
Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (refd)
Symon & Co v Palmer's Stores (1903) Ltd [1912] 1 KB 259 (refd)
Vasudevan v Damodaran & Anor [1981] 2 MLJ 150 (refd)
Westminster City Council v Clifford Culpin & Partners (1987) 137 New LJ 736 (folld)

Legislation referred to

Evidence Act 1950 s 114
Rules of the High Court 1980 O 3 r 5(1), O 14, O 25 rr 1(1), (2)(a), (5), O 32, rr 2(1), (2), 13(1)(a), 13(2)

Amar Chand Vohrah (*Vohrah & Tan Chee Lan*) for the plaintiff.
Fatima Tahir Ali (*SF Pang & Chandra*) for the defendants.

Augustine Paul JC: This is an appeal from a decision of the learned senior assistant registrar who had dismissed the second defendant's application to strike out the plaintiff's application for summons for directions on the ground that it had been filed out of time and, in consequence thereof, the claim itself.

On 15 September 1995, the plaintiff filed its writ and statement of claim against the three defendants as guarantors in respect of overdraft facilities granted to one Syarikat Seri Belian Sdn Bhd. The writ was duly

served on the three defendants. The plaintiff obtained judgment in default of appearance against the first and third defendants on 15 June 1996. The second defendant entered appearance on 30 October 1995 and filed his statement of defence on 21 November 1995. On 6 April 1996, the plaintiff filed an application for summary judgment against the second defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC'). The application which was contested by the second defendant was dismissed with costs by the learned senior assistant registrar on 22 November 1996. There was no appeal against the order made. No further steps were taken by the plaintiff till 29 January 1997 when its solicitors wrote to the solicitors for the second defendant to inquire whether the matter could be settled. The material parts of the letter read as follows:

> We would appreciate it if you could let us know whether your client is prepared to settle the case.
>
> Whilst we were unsuccessful in our O 14 application, that does not mean your client is not liable on the facts once we go for trial.
>
> Can you please take your client's instructions on the above matter and provide us with a reply within one month from date hereof failing which we will take steps to get the case ready for trial.

There was no response from the solicitors for the second defendant to this letter. The next step taken by the plaintiff was the filing of a summons for directions on 10 May 1997 which was fixed for hearing on 3 June 1997. In the meanwhile, the solicitors for the second defendant filed an application on 2 June 1997 praying for an order, inter alia, that the summons for directions be struck out on the ground that it had been filed out of time and that the action be dismissed for want of prosecution. On the same day, an unsealed copy of this application was served on the solicitors for the plaintiff. By letter dated 3 June 1997, the solicitors for the second defendant served on the solicitors for the plaintiff a copy of their affidavit in support of the application made by them. On 17 June 1997, the solicitors for the plaintiff received a sealed copy of the application and the affidavit in support of it from the solicitors for the second defendant. The learned senior assistant registrar heard the second defendant's application on 16 July 1997 and dismissed it on 23 July 1997. This appeal is by the second defendant against that order.

At the hearing of the appeal before me, learned counsel for the plaintiff raised a preliminary objection to the effect that the second defendant's application and affidavit in support of the application were served on him out of time based on O 32 of the RHC. The relevant rules of the order are as follows:

> 2 (1) Issue of a summons by which an application in Chambers is to be made takes place on its being sealed by an officer of the Registry.
>
> (2) A summons may not be amended after issue without the leave of the Court.
>
> 3 A summons asking only for the extension or abridgment of any period of time may be served on the day before the day specified in the summons for the hearing thereof but, except as aforesaid and unless the Court otherwise orders or any of these rules otherwise provides, a

summons must be served on every other party not less than 2 clear days before the day so specified.

13 (1) Any party —

(a) filing an affidavit intended to be used by him in any proceedings in Chambers; or

(b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,

must give notice to every other party of the filing or, as the case may be, of his intention to do so.

(2) Save as otherwise provided in these rules —

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Learned counsel for the plaintiff contended that O 32 r 13(2) of the RHC requires an affidavit to be served within 14 days from the date of filing of the application. He said that this rule must be read in the light of the judgment in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 where the Court of Appeal held that both the summons and affidavit must be filed and served on the other party as required by O 32 r 2(1) and (2) read together with O 32 r 13(1)(a) of the RHC. The Court of Appeal also observed in that case that an affidavit in support cannot exist independently of the summons and, until the summons that it supports is sealed, the affidavit has no legal effect. He then referred to *Rechik Kadir & Anor v Mohamed Shah Senusi* [1997] 1 CLJ Supp 508 where it was held that an unsealed copy of the application has no legal force. He also referred to *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 where the Court of Appeal rejected an affidavit as it was served one day out of time. Learned counsel then said that the 14-day period commenced on 2 June 1997 when the application was filed and sealed, as agreed by both parties, and expired on 16 June 1997. He concluded by saying that as the sealed copy of the application and affidavit were served on him on 17 June 1997, the second defendant was thereby out of time as the last day for service was 16 June 1997.

In her submission, learned counsel for the second defendant contended that O 32 of the RHC prescribes separate time periods for service of the application and the affidavit in support of it. She said that O 32 r 3 of the RHC deals with the time period for service of the application while O 32 r 13(2)(a) of the RHC deals with the time period for service of the affidavit. Thus, she said, it is clear and obvious that the application and the affidavit in support need not be served together. She referred to *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 and argued that in accordance with the interpretation given in that case to O 32 r 13(2)(a) of the RHC, the affidavit in support of the application having been served one day after the application was filed was served on time. She also

said that as the service of the sealed copy of the application on the plaintiff on 17 June 1997 was two clear days before its hearing date of 16 July 1997, it amounted to regular service within the meaning of O 32 r 3 of the RHC. She concluded by saying that as the documents were served on time, the preliminary objection raised by the plaintiff has no merits.

In my opinion, the answer to the preliminary objection raised before me rests on the interpretation to be accorded to rr 3 and 13 of O 32 of the RHC which does not appear to be well settled. For the purposes of my analysis of the two rules, I shall confine myself to the two Court of Appeal judgments in *Perbadanan Nasional Insurans & Ors v Pua Lai Ong* [1996] 3 MLJ 85 and *Structural Concrete Bhd v Wing Tiek Holdings Sdn Bhd & Ors* [1997] 1 MLJ 581. Siti Norma Yaakob JCA in writing for the court in *Pua Lai Ong* referred to the practice of litigants serving unsealed copies of the summons and the affidavit in support and said at pp 90–91:

> We reply in the negative as the purpose of serving the unsealed copy of the summons and the affidavit in support can be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application. It cannot do anything more than this as the unsealed copy of the summons has yet to get the official stamp of the court to clothe it with the authority that it has been issued pursuant to O 32 r 2(1) of the RHC. The affidavit in support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it. For this very reason, we consider that the obligation to reply has not arisen when the unsealed copy of the summons together with the affidavit in support was served for the first time on the respondent on 3 March 1995.
>
> However, we view the situation differently when the sealed copy of the summons together with the affidavit in support were served on the respondent on 12 April 1995. Since official recognition of the summons has been given with the sealing of the summons and the signing of the summons by the registrar with the return date clearly stated in the summons, the respondent is legally bound to reply to the affidavit in support should he wish to object to the application being granted.

It is implicit in the judgment in *Pua Lai Ong* that for the purpose of computing the commencement of time prescribed by O 32 r 13(2) of the RHC the relevant date is the date the application is sealed as opposed to it being filed. However, in *Wing Tiek Holdings Bhd*, Mahadev Shankar JCA in writing for the court took a different view when his Lordship said at p 586:

> However, we would like to add that the critical words in O 32 r 13(2) — for the purpose of computation of time — are 'within 14 days from the date *of the filing* of the application' and in O 32 r 13(2)(b) within 14 days from the date of service.
>
> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed.

Mahadev Shankar JCA reiterated his view in *Datuk M Kayveas v PV Das* [1997] 4 CLJ 544 where his Lordship said at p 551:

> Order 32 r 13(2)(a) of RHC was fulfilled because Das's affidavit in support was served *within* 14 days of the filing on 2 August 1996.

A It would thus appear that there is a divergence of opinion as to whether the computation of time for the purpose of O 32 r 13(2) of the RHC is to be based on the date of sealing or filing of the summons. In my opinion, both views are in harmony with each other and have the effect of producing the same result following what I have to say shortly. Order 32 B r 2(1) of the RHC says that the issue of a summons by which an application in chambers is to be made takes place on its being sealed by an officer of the court. The words 'issued' and 'sealed' are not defined in the RHC. Guidance may be obtained from *Black's Law Dictionary* (6th Ed) which defines the words as follows:

C *Issue*

When used with reference to writ, process, and the like the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service, etc.

Sealed

D Authenticated by a seal, executed by the affixing of a seal.

The issue of a summons takes place when it is filed in the registry for the purpose of being sealed to authenticate it. As the issue of a summons takes place when it has been sealed in accordance with O 32 r 2(1) of the RHC, the process of the issue of a summons is completed when it is sealed. E Litigants have been confronted with serious difficulties when a summons is dated and sealed well after it has been filed for the purpose of computation of time. This prompted Chong Siew Fai J (as he then was) to say in *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254 at p 255:

F In *Clark v Bradlaugh* [1881–85] All ER Rep 1002 (CA), it was held that the issue of a writ of summons in an action was not a judicial act but the act of the plaintiff. Now what has a plaintiff to do in the High Court Registry in Kuching when he wants to issue a writ of summons? He or his advocate will properly prepare and sign the required copies of the writ and the praecipe, and submit them to the proper officer in the court registry for dating, G signing and sealing after paying the prescribed fee. Once these are done, the plaintiff has completed his part in the issue of a writ. What is required thereafter is some act of the court official, eg the affixing of the seal of the court and so on, to give the writ its validity (O 5 rr 11, 12 and 13). Having regard to the provisions in O 2 r 8, the writ should, to my mind, be dated on the day the writ is filed and the filing fee is paid, and with the same date of filing and the payment. This is in line with such cases as *Pritam Kaur v* H *S Russell & Sons Ltd* [1973] 1 All ER 617 where the expiry date of the limitation period of a suit fell on a public holiday, the plaintiff issued the writ on the following day and the writ was dated with the date of that following day. Indeed, as Denning LJ said in *Pritam Kaur* on p 619:

> 'As soon as the offices of the court re-opened on Monday, 7 September 1970, the plaintiff issued the writ. That is to day, her solicitors took the I writ to the offices of the district registry at Leicester. A clerk in the registry stamped it with the official stamp in the proper place (*locus sigillare*). It was then duly issued.'

In *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440, Godfrey J in speaking for the Brunei Court of Appeal said at p 441H:

> The plaintiff lodged the correct papers for the institution of the suit, and paid the proper fees, on 18 April 1984 and accordingly the writ should have been sealed on, or as of, that date. There is no express provision to that effect in the rules, but it is, in our judgment, a matter of necessary implication. As this case shows, the date on which a suit is instituted may be crucial to the rights of the parties. To have those rights depend on the whim of a court functionary cannot be right. Such a thing cannot be allowed as an admissible feature of a civilized system of jurisprudence.

In *Aly v Aly* (1984) 128 Sol J 65, Eveleigh J observed that it did not make sense that a party who had done everything required of him by the rules should be penalized for something not done in time by the court. It would be surprising and harsh, his Lordship said, if a litigant who had done all that was required of him should be unable to obtain the court's assistance because the court itself had failed in some matter of procedure. It was accordingly held in that case that an application for the issue of a summons by post will be treated as having been made at the date of the actual receipt of the application at the appropriate court registry, and not the later date when the summons is actually issued by the court. This view reflects the line of thinking in the two cases that I have just referred to. This is a reasonable presumption as in the normal course of events a summons ought to be dated and sealed on the day on which it is filed. This, to my mind, accords with s 114 of the Evidence Act 1950 which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. It would therefore be appropriate for the summons to be dated as of the date of which it is filed in the court registry. I would therefore hold that a summons is to be regarded as having been dated and sealed on the day on which it is filed. The corollary is that the date of sealing of a summons shall be taken to be the date on which it is filed. In the circumstances, it makes no difference whether the computation of the 14-day period in O 32 r 13(2) of the RHC for the service of an affidavit is to commence from the date of filing or sealing of the summons. This is because both dates will produce the same result. With regard to service of the summons, the language employed in O 32 r 3 of the RHC requires a sealed copy to be served. This is made evident by the fact that the summons must be served two clear days before the day specified on it. As the hearing date on the summons will only be inserted by the court, it follows that the copy to be served must be a sealed copy. As it is sufficient to serve the summons two clear days before the hearing date, it follows that service of the summons and the affidavit may not coincide. I interpolate to refer to the practice of litigants serving an unsealed copy of the summons together with the affidavit. Though the unsealed copy may fail to qualify as a legal document, it does serve an important purpose. It normally carries an endorsement to the effect that the application will be supported by an affidavit. That meets the requirement of O 32 r 13(1) of the RHC which requires notice to be given to the other party of the intention to use an affidavit.

In accordance with the principle that I have discussed, it is my view that the documents were served on the plaintiff within time as required by

A the RHC. In any event, service of the affidavit by the second defendant on the plaintiff on 3 June 1997 when the application was filed and sealed on 2 June 1997 amounts to it being served within 14 days of filing and sealing of the application. As provided by O 32 r 3 of the RHC, the summons was served well before two clear days prior to the hearing date. Accordingly, the preliminary objection raised by the plaintiff cannot be sustained.

B

Based on the submissions made before me by both counsel the outcome of the appeal rests on a determination of the following three issues:

(a) whether a summons for directions is required where an application has been made for summary judgment;

C (b) the time period within which the plaintiff must apply for summons for directions on the facts of this case and the consequences of failure to do so; and

(c) the power of the court to dismiss an action for want of prosecution.

I shall now consider the issues against the background of the submissions D made by the parties.

Whether a summons for directions is required where an application has been made for summary judgment

E This issue is anchored on O 25 rr 1(1) and (2)(a) of the RHC which read as follows:

> 1 (1) With a view to providing, in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that —
>
> F (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and
>
> (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,
>
> G the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46 (in these rules referred to as a summons for directions) returnable in not less than 14 days.
>
> (2) This rule applies to all actions begun by writ except —
>
> H (a) actions in which the plaintiff or defendant has applied for judgment under Order 14, or in which the plaintiff has applied for judgment under Order 81, and directions have been given under the relevant Order ... .

In his submission, learned counsel for the plaintiff contended that O 25 r 1(2)(a) dispenses with the requirement of a summons for directions I when a party makes an application for summary judgment. He said that as the plaintiff had made an application for summary judgment, O 25 r 1 of the RHC ceases to be applicable with the result that the one-month period specified therein is not relevant. He said that when his application for summary judgment was dismissed, the court ought to have given directions under O 14 r 6 of the RHC which reads as follows:

6 (1) Where the Court —

(a) orders that a defendant or a plaintiff has leave (whether conditional or unconditional) to defend an action or counterclaim, as the case may be, with respect to a claim or a part of a claim; or

(b) gives judgment for a plaintiff or a defendant on a claim or part of a claim but also orders that execution of the judgment be stayed pending the trial of a counterclaim or of the action, as the case may be,

the Court may give directions as to the further conduct of the action and Order 25 rules 2 to 7 shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if the application under rule 1 of this Order or rule 5 thereof, as the case may be, on which the order was made were a summons for directions.

(2) In particular, and if the parties consent, the Court may direct that the claim in question and any other claim in the action be tried by the Registrar under the provisions of these rules relating to the trial of causes or matters or questions or issues by the Registrar.

Learned counsel then lamented that upon dismissal of his application for summary judgment, no directions were given by the court with the result that the time-period specified in O 25 r 1 of the RHC does not apply to the plaintiff.

Learned counsel for the second defendant opened her submission on this issue by explaining that the court may make one of four orders in an application for summary judgment. The court may either:

(a) dismiss the application; or

(b) allow the application; or

(c) give leave to the defendant to defend conditionally; or

(d) give leave to the defendant to defend unconditionally.

She then referred to O 25 r 1(2)(a) of the RHC and said that the dispensation from applying for summons for directions provided in that rule only arises when a plaintiff has applied for summary judgment and directions have been given under O 14 r 6(1) of the RHC. She reiterated that in order for the plaintiff to rely on the dispensation, the order made on his application for summary judgment must have been followed by directions given by the court. She then referred to O 14 r 6(1) of the RHC and said that the court would be entitled to give directions only if it orders that leave be given to defend an action conditionally or unconditionally. In support of her argument that the power of the court to give directions only arises when the court makes any one of these two orders, she referred to the *Supreme Court Practice* (Vol 1, 1993) where it says at pp 170–171:

> This rule makes it obligatory on the court to give directions as to the further conduct of the action whenever leave to defend is given, whether conditionally or unconditionally ....

She also referred to *Symon & Co v Palmer's Stores (1903) Ltd* [1912] 1 KB 259 where Vaughan Williams LJ said that the duty to give directions for the further conduct of the action does not arise when the summons for judgment is dismissed and that there may not be jurisdiction to do so. She concluded by saying that as the application for summary judgment was dismissed in this case, the question of the court giving directions does not arise with the result that the plaintiff is duty bound to apply for summons for directions within one month from 22 November 1996 when the application was dismissed. In support, she referred to p 173 of the *Supreme Court Practice* (Vol 1, 1993) where it says:

> Where a summons under O 14 is dismissed, parties are restored to the same position in the action as they were before its issue ... On the simple dismissal of the summons, there is no power to give directions as on a summons for directions under O 25; the plaintiff must in due time issue a separate summons for directions.

In my opinion, learned counsel for the second defendant has stated the law correctly. Order 25 r 1(2)(a) of the RHC clearly states that the requirement of a summons for directions does not arise when, inter alia, a party has applied for summary judgment under O 14 of the RHC and directions have been given under that order. Order 14 r 6(1) of the RHC enumerates the instances when the court may give directions in an application for summary judgment. Under the rule, the court may give directions only when it gives leave to defend conditionally or unconditionally, or gives judgment on a claim or part of a claim with the further order that execution of the judgment be stayed. Thus, where the application is dismissed, the court has no power to give directions under O 14 r 6(1) of the RHC. This is for the obvious reason that when the application is dismissed, parties are restored to their original position. It follows that in such instances, O 25 r 1(2)(a) of the RHC has no application. In such circumstances, the applicant for summary judgment whose application has been dismissed must apply for a summons for directions.

The time period within which the plaintiff must apply for summons for directions on the facts of this case and the consequences of failure to do so

When the plaintiff filed the application for summary judgment, O 25 r 1(1) of the RHC ceased to be applicable as provided by r 1(2)(a). However, when his application was dismissed, it became obligatory for him to issue the summons for directions. The time period will, as of necessity, run from the date of dismissal of his application, that is to say, one month from 22 November 1996. In all other respects, the procedure laid down in O 25 of the RHC will remain the same. I shall therefore consider the consequences of failure to apply for summons for directions on that basis. Order 25 r 1(1) of the RHC provides that the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons of directions returnable in not less than 14 days. This rule is couched in mandatory terms and as the *Supreme Court Practice* (Vol 1, 1997) says at pp 460–461:

> ... the plaintiff must issue his summons for directions within one month after the close of pleadings ... In either case, the duty lies upon the plaintiff to issue his summons within the proper time ... .

Where the plaintiff fails to take out the summons for directions within the stipulated time, the defendant has two courses of action open to him. As provided by O 25 r 1(4) of the RHC, he may himself take out the summons for directions or apply for an order to dismiss the action. He may pursue either one of the remedies available to him and it is not incumbent on him to take out the summons (see *Leong Seng Kiat v Law Peng Guan & Ors* [1992] 2 CLJ 825). It is provided by O 25 r 1(5) of the RHC that on an application by a defendant to dismiss the action, the court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

When a plaintiff is faced with an application to dismiss the action on the ground that he has not taken out a summons for directions within the stipulated time, then the procedure to be followed by him, if he desired to take out the summons, is to apply for an extension of time to do so. This is for the obvious reason that O 25 r 1(1) of the RHC has fixed a time limit within which he must take out the summons and O 3 r 5(1) provides that the court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by the rules to do any act in any proceedings. An application must be made for that purpose. In this regard, I refer to *Ratnam v Cumarasamy & Anor* [1965] MLJ 228 where Lord Guest said at p 229:

> The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

In *Savill v Southend Health Authority* [1995] 1 WLR 1254, the Court of Appeal reiterated that the correct principle to be applied was that stated by Lord Guest in *Ratnam*. In *Costellow v Somerset County Council* [1993] 1 WLR 256, the Court of Appeal gave the following guidance for courts confronted by a situation where a defendant applies to have an action dismissed because of a failure by the plaintiff to take some step in the proceedings within the time required by the rules and where the plaintiff at the same time applies for an extension of time to take the step in question. It requires a consideration of two principles. The first is that the rules of court must be obeyed to promote the expeditious despatch of litigation. The second is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Normally both summonses are heard together. A rigid mechanistic approach is inappropriate and accordingly there can be no general rule that the plaintiff's application should be heard first with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default (see *Price v Dannimac;* The Independent, 3 August 1990 (CA)).

In this case, the plaintiff had taken out his summons for directions after the expiry of the one-month period following the dismissal of his application for summary judgment without seeking an extension of time to enable him to do so. As a matter of fact, when I asked learned counsel for the plaintiff whether he intended to apply for an extension of time to validate his summons for directions, he repeated his submission that O 25 r 1 of the RHC does not apply in this case in view of the application for summary judgment that had been made and that the question of extension of time therefore does not arise. I have already discussed the manner in which learned counsel for the second defendant had demolished this argument. However, in his written submission, learned counsel prayed for the court to invoke its inherent jurisdiction to extend the time. In my view, this is not a proper case for the court to exercise its inherent jurisdiction for two reasons. Firstly, the RHC authorizes the plaintiff to make an application for extension of time to take out his summons for directions. If he chooses not to exercise the remedy expressly provided for, I do not see any good reason why the court should invoke its inherent powers to assist him. Secondly, and in any event, the exercise of the court's inherent powers has its own limitations. In this regard, I refer to *Ho Yoke Kwei & Anor v Ong Eng Hin* [1997] 4 MLJ 292 where I said at pp 308–309:

> The starting point for the answer to this question is *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* 4 WW 542 where the Court of Appeal of Manitoba in adopting a passage from Sir Jack Jacob's article entitled *The Inherent Jurisdiction of the Court* said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. In *Loo Chay Meng v Ong Cheong Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, VC George J (as he then was) held that in a situation where a lacuna exists in the RHC 1980 and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies, the court is then not only entitled to fill the gap by using its inherent jurisdiction, but is obliged to do so, in order to avoid an injustice. In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, Edgar Joseph Jr J (as he then was) said that the court has jurisdiction to grant a Mareva injunction in the exercise of its inherent jurisdiction. This shows that the inherent power of the court is not confined to merely filling in gaps in the rules but extends to mould remedies where no provision is made for them in the rules. However, the inherent powers cannot be invoked to override express provisions in the rules. The limitation on the use of the court's inherent jurisdiction was laid down by the Supreme Court in *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 where Syed Agil Barakbah SCJ in referring to O 92 r 4 of the RHC 1980, which is in pari materia with O 53 r 11 of the SCR 1980, said at p 181:
>
> > 'If follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.'
>
> This is illustrated by *Re ABZ (An infant)* [1992] 2 SLR 442 where an application to set aside an adoption order in the exercise of the court's

inherent jurisdiction was refused as the Adoption of Children Act 1930 provides a remedy for re-adopting the child. In the circumstances, O 2 r 1 of the SCR 1980 is not affected by the inherent powers of the court.

In the premises, it is my view that as the summons for directions taken out by the plaintiff is out of time and as there is no application requesting for an extension of time to do so, it must be dismissed and I do so accordingly.

The power of the court to dismiss an action for want of prosecution

The resultant matter for consideration is whether the action should be dismissed as there is now no summons for directions before the court or, alternatively, whether the second defendant's application should be treated as if it were a summons for directions.

The submission of learned counsel for the plaintiff was that, in substance, there has been no inordinate delay on his part in proceeding with the action to warrant it being dismissed and, in support of his argument, relied on the principles laid down in *Birkett v James* [1977] 2 All ER 801. In her reply, learned counsel for the second defendant contended that the plaintiff is guilty of intentional and contumelious conduct and that the action should be dismissed for want of prosecution without proof of prejudice from her client. She referred to the judgment of the House of Lords in *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417 and argued that the principles laid down in *Birkett v James* [1977] 2 All ER 801 should be reviewed.

The principles governing the court's discreation to dismiss an action for want of prosecution were first stated by Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543 and later approved by the House of Lords in *Birkett v James* [1977] 2 All ER 801. The principles enunciated are that the power should be exercised only where the court is satisfied either: (i) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants as between themselves and the plaintiff or between each other or between them and a third party. These principles have been adopted in a plethora of local cases. I must, at this stage, observe that these principles are merely an additional power of the court to dismiss an action. They do not affect the power of the court to dismiss an action for failure to take any step in the proceedings as required by the RHC. In so saying, I derive support from *Allen v Sir Alfred McAlpine & Sons* [1968] 1 All ER 543 itself where Lord Denning MR said at p 547:

> ... If a plaintiff fails within the specified time to deliver a statement of claim, or to take out a summons for directions, or to set down the action for trial, the defendant can apply for the action to be dismissed (RSC O 19 r 1; O 25 r 1; O 34 r 2). It was argued before us that the court should never, on the

> first application, dismiss the action. Even if there was long delay, the court should always give the dilatory solicitor one more chance. The order should be that the action should be dismissed 'unless' he takes the next step within a stated time. Such has been the practice, it was said, for a great many years. It was confirmed by Sir George Jessel MR in *Eaton v Storer* (1882) 22 Ch D 91 at p 92: and it should not be changed without prior notice. I cannot accept this suggestion. If there were such a practice, there would be no sanction whatever against delay. The plaintiff's solicitor could put a case on one side as long as he pleased without fear of the consequences.

This passage was quoted with approval by the Federal Court in *Vasudevan v Damodaran & Anor* [1981] 2 MLJ 150. In *Birkett v James* [1977] 2 All ER 801, Lord Diplock explained the growth of this additional jurisdiction of the court to dismiss an action for want of prosecution against the background of the power of the court to dismiss an action for not taking a procedural step timeously as provided by the rules. This is what his Lordship said at pp 804–805:

> The modern practice as to dismissing actions for want of prosecution dates from 1967. By that time, the dilatory conduct of proceedings in the High Court by solicitors to plaintiffs whose causes of action would turn on the reliability of witnesses' recollections of past events had become a scandal, particularly in the case of those who litigated with the help of legal aid. Postponement of a trial until memories had faded and witnesses had vanished created a substantial risk that justice could not be done. True it is that at the trial, the evils of delay would be likely to bear more heavily on the plaintiff on whom the onus would lie of proving that things had happened as he alleged, but the risk that justice would not be done to him extended also to the defendant and, even if successful at the trial, the defendant was likely to be out of pocket for his costs, which in legally aided cases he had little prospect of recovering.
>
> Although the Rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for directions and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution, except on disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.
>
> To remedy this, High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in *Reggentin v Beecholme Bakeries Ltd* [1968] 1 All ER 566; 2 QB 276 (reported in a note to *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543; 2 QB 229) and *Fitzpatrick v Batger & Co Ltd* [1967] 2 All ER 657; 1 WLR 706.
>
> The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer

to as *Allen v McAlpine* [1968] 1 All ER 543; 2 QB 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since.

It is therefore apparent that the principles were evolved by the English courts in the exercise of their inherent jurisdiction as a result of their reluctance to dismiss actions for failure to comply timeously with important steps in the preparation of an action for trial as provided for in their Rules of the Supreme Court. It follows that the principles are separate and distinct from the power given by the RHC to dismiss an action for non-compliance with the rules. To transplant the principles into the explicit provisions of the RHC does not harmonize with the purpose for which the rules were introduced. Consequently, any provision in the RHC which authorizes an action to be dismissed for non-compliance with the rules must be given full effect without being influenced by the principles in *Birkett v James* [1977] 2 All ER 801.

In recent times, the principles have been subjected to some criticism in England. In *Westminster City Council v Clifford Culpin & Partners* (1987) 137 New LJ 736 (CA), Kerr LJ said at p 737:

> By far, the major part of all delays stems solely from the way in which litigation is conducted. In this connection, our law needs to be changed, both in substance and procedurally. The principles laid down in *Birkett v James* [1978] AC 297; [1977] 2 All ER 801 are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover, they then breed excessive further delays and costs in their application. The long line of decisions concerned with striking out applications, both report and unreported, demonstrate that the regime in *Birkett v James* should be replaced by a system of rules which are much stricter, more effective and simple to apply.

Kerr LJ's sentiments found favour with the House of Lords in *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897. In *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417 the House of Lords highlighted the criticism levelled against the principles enunciated in *Birkett v James* [1977] 2 All ER 801 at pp 419–420 in the following terms:

> The requirement laid down by the second principle that the delay has to cause 'serious prejudice' to the defendants can and has been the subject of criticism. It is suggested:
>
> (1) The effectiveness of the court's power to strike out proceedings as a sanction against delay is undermined by the need to show prejudice to the defendants. This requirement prevents the court taking into account the adverse effect which delay can have on the reputation and efficiency of the civil justice system as a whole. Defendants (for reasons which will be explained later) find it difficult to establish prejudice, so the requirements of the Rules of the Supreme Court and the County Court Rules as to time can usually be ignored with a reasonable degree of confidence that nothing very serious will happen in consequence. Actions therefore take much longer to come to trial than they should and the general impression given to the public is that litigation is a very long drawn-out process with which they should try to avoid becoming involved.

(2) What is regarded as capable of amounting to prejudice is too restricted. Normally, little regard is paid to the anxiety caused to litigants as a result of litigation. The fact that a defendant will normally recover his costs if he succeeds is regarded as providing a sufficient protection to the defendant for the consequence of being involved in the proceedings. This is far from being the position, the costs payable do not usually indemnify the defendant for the cost actually incurred and their recovery is delayed.

(3) In order to establish prejudice, a defendant is required usually to show that the delay has prejudiced him in the conduct of his defence. This will involve him in having to demonstrate, for example, that his witnesses' recollection has been adversely affected. Relying on this sort of ground is all right from the defendant's point of view if the action is struck out but can be unfortunate if the action is not struck out since he has undermined his own case by his comments about his witnesses.

In *Grovit*, Lord Woolf said that, as reforms in this area of the law are now on the horizon '... it is at least open to question whether it is not preferable to await the outcome of the implementation of the new rules before making a substantial inroad on the principles indorsed by Lord Diplock in *Birkett v James*. They should by case management prevent the delay happening. If delays do happen, they could provide the court with wider powers to mitigate the consequences' (at p 421). His Lordship then added:

> In the meantime, both the court and defendants have the means to achieve greater control over delay. Defendants do not need to wait until there has been inordinate delay before applying for peremptory orders (although they are under no obligation to do this). The courts should more readily make 'unless orders', that is orders that an action should be struck out unless certain steps are taken at certain times. The advantage of such an order is that it places the onus on the plaintiff to justify the action being allowed to continue whereas in the case of an application to strike out the onus is on the defendant to show that the action should be struck out.
>
> Certainly, this appeal is not an appropriate vehicle for making significant inroads on the principles indorsed by Lord Diplock in *Birkett v James*. The respondents are not represented and so their Lordships have not had the advantage of subjecting submissions by counsel in favour of such a change to the scrutiny which is a desirable condition of precedent to such a change.

And at p 424:

> ... To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation, the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v James*. In this case, once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial, the court was entitled to dismiss the proceedings.

It will therefore be observed that there is some dissatisfaction in England with the principles laid down in *Birkett v James* [1977] 2 All ER 801. In the face of the very court, that is to say, the House of Lords, that endorsed the principles having second thoughts about their usefulness, I do not see any good reason why we should continue to pay homage to them. It is unreasonable to cast any burden on the defendant to show that he has been prejudiced as a result of the plaintiff's delay in prosecuting the case when he applies to strike out an action. As Lord Woolf pointed out in *Grovit*, a defendant who seeks to establish prejudice on the ground that his witnesses' recollection has been adversely affected will run into difficulties if his argument is not upheld as he would have undermined his own case by his comments about his witnesses. In any event, the application of the principles in the exercise of the court's inherent jurisdiction is inconsistent with what has been expressly laid down in O 25 of the RHC. As I said in an earlier part of the judgment, the inherent jurisdiction of the court cannot be invoked to override an express provision in the RHC. The requirement that there must be an inordinate delay before an action can be struck off contributes to delayed rather than expedited disposal of cases. It is perhaps appropriate to refer, at this stage, to *Public Finance Bhd v Natcom Development Sdn Bhd & Ors* [1996] 2 MLJ 657 where Gopal Sri Ram JCA in writing for the Federal Court said at p 663F:

> ... Those who invoke the process of the court must be prepared to act timeously in having their grievances heard. The courts are no longer prepared to tolerate the long delays with which the law has been associated. These days, trial courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest.

In my opinion, O 25 of the RHC is sufficient to ensure that proceedings are conducted expeditiously and at the same time it contains enough safeguards to see that cases are not struck out unreasonably. If a plaintiff fails to take out a summons for directions within the stipulated period, the defendant may, inter alia, apply for the action to be dismissed. This right accrues to the defendant upon the plaintiff failing to take out the summons within the prescribed time. In the light of such explicit provisions, it is a contradiction in terms to say that there must be inordinate delay on the part of the plaintiff in prosecuting his case and prejudice suffered by the defendant before it can be dismissed for non-compliance with the rules. To my mind, the principles create a fetter in the due administration of justice and slow down the litigation process rather than expediting it. As I had the occasion to observe in *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685 at pp 695–696:

> ... This in turn would mean that the court itself would be fettering a discretion entrusted to it by law and thereby preclude itself from exercising that discretion properly. In this regard, Edgar Joseph Jr FCJ said in *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 at p 152:
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> > 'As was well put by Bowen LJ in *Jones v Curling & Anor* 13 QBD 262 at p 271:

A "I have always entertained the strongest opinion that the court would be acting ultra vires if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or judicature rule which creates the discretion gives it in simple and unqualified terms.

B It follows, that if judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the court then, as was pointed out by Brett MR in *The Friedberg* 10 P 112 at p 113, they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do." '

C And Glidewell J said in *R v Sevenoaks Council, ex p Terry* [1985] 3 All ER 226 at p 229:

'It is a principle of long standing that a body charged with exercising discretion in the making of decisions must not, by its own act or decision, prevent itself from exercising that discretion properly. The cases in which the principle has been applied are, first, the adoption of an overall policy on a particular issue which effectively removes discretion, for example a policy of a licensing authority not to grant licenses in defined circumstances, and, second, the giving of an undertaking, normally by way of contract, not to exercise discretion in a particular way.'

E It must be noted that guidelines laid down by courts to be followed in the exercise of a discretion are there for assistance only and are not to be used as rules never to be departed from (see *Evans v Bartlam* [1937] AC 473; *R v Nicholas* (1986) The Times, 23 April (CA)); *Cookson v Knowles* [1978] 2 All ER 604).

F Be that as it may, the views that I have expressed do not require serious consideration in the light of the power of the court, as pointed out by learned counsel for the second defendant, to deal with her application as if it were a summons for directions. In my opinion, this power entrusted to the court ensures that cases are not dismissed automatically upon failure of a plaintiff to issue a summons for directions within the one month period. It is a discretionary power to be exercised dependent on the G facts of a particular case. In exercising this power, I take into account the fact that the delay in this case is not substantial and that the defendant himself has contributed to it to some extent. Accordingly, I order that the second defendant's application be dealt with as if it were a summons for directions and remit the case to the learned senior assistant registrar to H make the necessary orders within two weeks from today. In the upshot, I allow the appeal. There shall be no order for costs both here and before the learned senior assistant registrar by the consent of both parties.

Appeal allowed.

I Reported by Loo Lai Mee